Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JOSE RUIZ,

Petitioner,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Utah Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1) What is the quantity and quality of evidence that a Federal Employers' Liability Act plaintiff must generally produce in order to withstand a defendant's motion for summary judgment?

2) Is the quantity and quality of evidence that a Federal Employers' Liability Act plaintiff must generally produce in order to withstand a defendant's motion for summary judgment greater when the issue is whether the railroad worker was injured while "employed" in commerce?

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JURISDICTIONAL STATEMENT

Respondent's motion for summary judgment was granted by the Second Judicial District Court of Weber County, Utah, pursuant to its ruling dated January 11, 1994 and its order dated January 27, 1994. Appendix A. The judgment was affirmed by decision of the Utah Court of Appeals filed February 1, 1996. Appendix B. Petitioner's petition for writ of certiorari was denied by the Utah Supreme Court on May 29, 1996. Appendix C.

The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment in question is 28 U.S.C. section 1257(a).

APPLICABLE STATUTE

The applicable statute, codified as 45 U.S.C. section 51, is reproduced verbatim as Appendix D. In relevant part, with emphasis added, it provides that:

> Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury *while he is employed by such carrier in such commerce* . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . track, roadbed, works . . . or other equipment.
>
> Any employee of a carrier, *any part of whose duties as such employee shall be the furtherance of interstate . . . commerce; or shall, in any way*

> *directly or closely and substantially, affect such commerce* . . . shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act. . . .

STATEMENT OF THE CASE

A. Material Facts

1) Petitioner was a maintenance of way worker employed by respondent and assigned to an "extra gang" working out of Montello, Nevada. (R. at 252-53, 321-22, 418).

2) Respondent provided transportation by truck for the extra gang members from Montello to its work sites. (R. at 167, 288, 304).

3) On the date of the accident, when the crew was to fix railroad tracks at Lakeside, Utah, pursuant to permission from his foreman, petitioner was allowed to drive his own vehicle to the work site so that he could drive from there directly home to Ogden, Utah for the weekend. (R. at 167, 288, 431).

4) The extra gang members traveling in respondent's truck from Montello to Lakeside on May 18, 1990, were considered to be on-duty and were paid overtime from 5:00 a.m. until 7:00 a.m. for the two-hour commute. (R. at 167, 260, 287, 293, 314, 414).

5) Petitioner's foreman testified by affidavit that petitioner understood he would not be compensated for

the trip but that it was worth giving up the pay to get home earlier. (R. at 167).

6) At about 5:00 a.m. on May 18, 1990, petitioner was dressed for work and advised his foreman that he would be right behind the truck and that they would meet at Lakeside. (R. at 311-13).

7) Petitioner was injured while driving his private vehicle from Montello in a rollover accident approximately 14 miles from the work site at Lakeside while on a private gravel road owned and maintained by defendant which ran parallel to the railroad tracks. (R. at 7, 166-68, 287, 395).

8) Petitioner suffered a severe head injury from the accident, has been adjudicated mentally incompetent because he functions at the level of a three year old, was not capable of participating in a deposition and was unavailable as a witness. (R. at 283-84).

B. Federal Questions Raised in State Courts

Because this case arises under the Federal Employers' Liability Act (FELA), federal law governs. *New York Central R.R. Co. v. Winfield*, 244 U.S. 147 (1917). Accordingly, FELA precedents were cited and argued to the state trial and appellate courts.

The federal authorities were first cited by petitioner in his trial court opposition to respondent's motion for summary judgment. See Appendix E. Additional FELA authority was extensively discussed in petitioner's brief

to the Utah Court of Appeals. The summary of argument in that brief is included as Appendix F.

ARGUMENT

A. As to Each Question Presented the Decisions Conflict

The first question presented for review deals with the evidentiary requirements imposed upon FELA plaintiffs in general to withstand a motion for summary judgment. The second question presented deals with those evidentiary requirements when a railroad moves for summary judgment specifically on the basis that the injury of its employee did not occur while the employee was "employed" in commerce, the statutory requirement to qualify for benefits.

The decisions on each question are in conflict as is demonstrated by a Sixth Circuit opinion filed the day after the Utah Supreme Court denied petitioner's writ of certiorari in this case.

In *Aparacio v. Norfolk & Western Ry. Co.*, 84 F.3d 803 (6th Cir. 1996), the court reviewed the general evidentiary standard required of an FELA plaintiff in order to withstand a defendant's motion for judgment as a matter of law. Because the federal summary judgment standard "mirrors the standard for a directed verdict," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986), that review by the Sixth Circuit is applicable here.

In the background of that review were two tests set forth by this Court to determine when the issue of railroad negligence must go to the jury in FELA cases. The latter of the two cases stated the test as follows:

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury . . . for which damages are sought. *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506 (1957).

The earlier case had held in part that:

> The weight of the evidence . . . must be more than a scintilla before the case may be properly left to the discretion of the trier of fact . . . . *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479 (1943).

In *Aparacio* the Sixth Circuit noted that this Court has not since *Rogers* "defined in a more precise manner the quantum of evidence" requirement for an FELA plaintiff. *Aparacio*, 84 F.3d at 809. The Sixth Circuit went on to note the varying standards that have been embraced by the various circuits as follows:

Seventh Circuit, "slight negligence," *Harbin v. Burlington Northern R.R. Co.*, 921 F.2d 129, 131 (7th Cir. 1990);

Ninth Circuit, "not outside the possibility of reason," *Mullahon v. Union Pac. R.R.*, 64 F.3d 1358, 1364 (9th Cir. 1995);

Fourth Circuit, "substantial evidence," *Brown v. CSX Transp., Inc.*, 18 F.3d 245, 248 (4th Cir. 1994);

Third Circuit, "more than a scintilla of evidence," *Gill v. Pennsylvania R.R. Co.*, 201 F.2d 718, 720 (3d Cir.) *cert. denied*, 346 U.S. 816 (1953).

The Sixth Circuit then held that:

> *Brady* and *Rogers* require a Federal Employers' Liability Act plaintiff to present more than a scintilla of evidence in order to create a jury question on the issue of employer liability, but not much more. *Aparacio*, 84 F.3d at 810.

Just as the general question presented for review demonstrates varying evidentiary standards within the United States Court of Appeals, the more specific question presented for review has had varying standards defined.

Consistent with its response to the general question presented here for review, the Sixth Circuit states as follows:

> A plaintiff must present more than a scintilla of evidence to prove that (1) an injury occurred while the plaintiff was working within the scope of his or her employment with the railroad [and] (2) the employment was in furtherance of the railroad's interstate transportation business . . . . *Aparacio*, 84 F.3d at 810.

The Seventh Circuit concludes differently. In *Wilson v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 841 F.2d 1347 (7th Cir.), *cert. dismissed*, 487 U.S. 1244 (1988), the court rejected plaintiff's argument that the scope of employment definition should be tested by the "justify with reason" standard used by this court in *Rogers*. Contrary to the recent approval in *Aparacio* of the special

FELA "more than a scintilla" standard, the Seventh Circuit determined that the traditional summary judgment standard governed whether a railroad employee's injury "was actually 'work-related.' " *Wilson*, 841 F.2d at 1353.

This division of the federal courts finds a counterpart at the state level. In *Turpin v. Chicago, Burlington & Quincy R.R. Co.*, 403 S.W. 2d 233, 237 (Mo.), *cert. denied*, 388 U.S. 1003 (1966), the court rejected plaintiff's argument that under the FELA decisions, the employment issue, like the negligence and causation issues, should be submitted to the jury on "any evidence 'even the slightest . . . . ' " However, sixteen years later in the same state, a court revisited the issue.

In the later case a railroad argued in support of its motion for directed verdict "that plaintiff's burden of making a submissible case on the employment issue required more proof than the 'scintilla' of evidence commonly referred to in FELA cases." *Vinyard v. Missouri Pac. R.R.* 632 S.W.2d 272, 276 (Mo. App.1982). The court responded to the argument as follows:

> We have read the cases cited in *Turpin* and do not see plaintiff's burden on the employment issue as clearly defined as our Supreme Court did. For our purpose here, however, we assume plaintiff had the burden of showing his employment by the railroad by a preponderance of the evidence rather than a scintilla of the evidence. *Id.* at 277.

The court then held that plaintiff had satisfied his burden on the preponderance standard. *Id. at 277.*

It is understandable in light of the prior Missouri Supreme Court ruling that the Missouri Court of Appeals would apply the higher preponderance of evidence standard used to instruct juries in civil cases. The problem, however, is that courts which do not sit as triers of the facts are required to use a different standard in evaluating motions for judgment as a matter of law, whether the motions are presented as a request for summary judgment or otherwise.

In the quest for definition of the appropriate FELA standard for evaluating any motion for judgment, the Sixth Circuit has recently applied this Court's summary judgment analysis set forth in *Anderson*, 477 U.S. at 254, to confirm

> that the district court must view the evidence through the "prism of the substantive evidentiary burden" when deciding summary judgment motions, "bearing in mind the actual quantum and quality of proof necessary to support liability" under the substantive law. *Basinger v. CSX Transp., Inc.*, 1996 U.S. App. LEXIS 19139 (6th Cir. July 16, 1996).

Using the prism of the lesser evidentiary standard on the issues of negligence and causation, the Sixth Circuit then affirmed the district court's order granting summary judgment to the railroad. Because employment was not an issue, the court had no need to apply the prism to that issue under the "more than a scintilla of evidence" analysis described as appropriate for the employment issue in *Aparacio*, 84 F.3d at 810.

The conflicting analyses that have arisen in FELA since this Court's 1957 *Rogers* opinion and the related

questions arising from the application of *Anderson* to FELA cases have compounded the confusion otherwise evident in the FELA cases dealing with motions for summary judgment or for other procedural remedies which seek to avoid or overturn jury verdicts. The next section will provide an overview of that confusion. Because the case which brings this petition to the Court deals with the employment issue, the overview will be limited to that issue.

B. There Is No Well-Defined Summary Judgment Standard for the "While Employed In Commerce" Statutory Test

This Court long ago determined that the issue of whether a railroad worker was employed in commerce is generally for the jury. See *North Carolina R.R. Co. v. Zachary*, 232 U.S. 248, 260 (1914) (evidence "was sufficient" for jury determination); *New York Central & Hudson River R.R. Co. v. Carr*, 238 U.S. 260 (1915) (verdict affirmed).

This Court also provided guidance long ago as to the words "employee" and "employed" contained in the statute. *Robinson v. Baltimore & Ohio R.R. Co.*, 237 U.S. 84, 94 (1915) (used "in their natural sense, and intended to describe the conventional relation of employer and employee").

Prior to a statutory addition in 1939 (Appendix D, second paragraph), whether an employee was engaged in commerce at the time of the injury was an on-going issue for the courts. This Court provided guidance in *Carr*, 238 U.S. at 263-64:

> Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employee is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or necessary incident thereof.

In 1959 this Court dealt with the terms "employee" and "employed" in the context of whether the railroad defendant was the employer of the injured worker or whether another entity was the employer. *Baker v. Texas & Pac. Ry. Co.*, 359 U.S. 227 (1959). In that setting the Court utilized the Restatement of Agency to expand upon *Robinson*. In the face of conflicting evidence at trial, the Court reversed the holding below that the employment issue was properly decided by the trial judge in favor of the railroad as a matter of law. The choice "from among conflicting inferences and conclusions" was for the jury. *Baker* at 229.

This Court again faced the "employee" issue, also in the setting of which of two entities was the employer, in *Ward v. Atlantic Coast Line R.R. Co.*, 362 U.S. 396 (1960). The Court again referenced the Restatement of Agency factors and held that the "employee" issue "is one for determination by the jury on the basis of all the relevant factors." *Id.* at 400.

The issue resurfaced, again in the setting of which entity was the employer, in *Kelley v. Southern Pac. Co.*, 419 U.S. 318 (1974). The Court focused on the full statutory phase "while he is employed," reviewed many federal and state cases and ultimately remanded the case. Noted again was the Restatement of Agency as "instructive"

whether the issue is a bilateral master-servant or independent contractor relationship or is a three-party relationship between two employers and a worker. *Id.* at 324. Because all issues had been tried to the court (*id.*, 486 F.2d 1083, 1084 (9th Cir. 1973)), jury resolution was not an issue.

This Court has not directly held that the Restatement of Agency factors offer guidance for determination by a jury on the bilateral issue of whether a railroad employee fits within the statutory terms "employee" and "employed." The inference, however, is certainly there based upon the *Baker, Ward* and *Kelley* trilogy. Under the analyses of those cases and of the Restatement of Agency, when there is conflicting evidence, the inferences and conclusions are for the jury. See *Baker* at 229.

However, the problem in terms applicable to this case and to summary judgment cases in general is to determine whether disputes over facts are genuine and whether those facts are material so that they "might affect the outcome of the suit under governing law [and] properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248.

If the underlying substantive issue is determined by a jury applying a series of factors, summary judgment will never be appropriate when a dispute over material facts is genuine and is supported by evidence. Thus, when the "employee" "employed" FELA issue is before the court on a railroad employer's motion for summary judgment or an equivalent procedural motion, the court's only task is to determine the materiality of the disputed

facts, the genuiness of the dispute and whether there is evidence to support the non-moving party.

This analysis brings us full circle, however. The question remains: How much evidence and what kind of evidence? Whether the standard is "more than a scintilla, . . . but not much more" (*Aparacio*, 84 F.3d at 810) or some other standard, the trial court's role is limited. Certainly, the judge is not "to weigh the evidence and determine the truth of the matter . . . . " *Anderson*, 477 U.S. at 249. Neither is it the court's role to choose "from among conflicting inferences and conclusions . . . . " *Baker*, 359 U.S. at 229.

With that background we can examine what the courts actually did in the case which generated this petition and in the two federal cases upon which the Utah Court of Appeals relied.

C. The Courts Below Did Not Adhere to the Summary Judgment Standard Properly Derived From This Court's Opinions

Forty-four years ago this Court granted the petition for a writ of certiorari to the Tenth Circuit filed by the administrator of a deceased railroad worker. Five months later the petition was dismissed pursuant to stipulation of counsel. The issue raised by that case has not since been resolved by this Court or by any other court. That Tenth Circuit case is the first of the two cases cited by the Utah Court of Appeals.

The case was *Atchison, Topeka & Santa Fe Ry. Co. v. Wottle*, 193 F.2d 628 (10th Cir.), *cert. granted*, 343 U.S. 963,

cert. dismissed, 344 U.S. 850 (1952). It was a "scope of employment" case, tried to the court, with the material facts bearing on the "on duty" issue not in dispute.

The facts of the case turned on the application of the "necessary incident" criterion set forth by this Court in *Carr*. The Tenth Circuit majority, without reference to the 1939 FELA amendment which provided a statutory definition not including "necessary incident" (see Appendix D), noted that "[t]he difficulty arises, as always, in drawing the dividing line in the twilight zone." 193 F.2d at 630.

The trial court, acting as a fact-finder, had found that the deceased was acting within the scope of employment. The Tenth Circuit majority drew the line at a different place and reversed. Factually, the issue concerned an after-duty hours injury. To the majority, the FELA

> obviously does not cover activities undertaken by an employee for a private purpose and having no causal relationship with his employment. . . .
>
> Obviously, the legislation was not intended to go so far. *Id.* at 630, 631.

To the dissenting judge, referencing adjudications by this Court and the courts of appeal, it was not so obvious:

> [I]t seems reasonably clear to me that at the time of the accident the deceased was engaged in an act which constituted a necessary incident to his employment in commerce within the intent and meaning of the Act. . . . " *Id.* at 631.

Apparently acting under the "clearly erroneous" standard for reversing a trial court's finding (see *Kelley*, 419 U.S. at 323), the court reversed the judgment for plaintiff.

The other authority cited by the Utah Court of Appeals in this case is *Rogers v. Chicago & North Western Transp. Co.*, 947 F.2d 837, 839 & n.4 (7th Cir. 1991). In that case the district court had granted summary judgment on undisputed facts to the railroad on the scope of employment issue. In the course of its affirming opinion at the cited reference, the court followed the request of appellant to look to the Restatement of Agency. However, in rejecting appellant's argument, the court did not even note the guidance of this Court in *Baker* and *Ward* as to the role of a jury.

Because the facts were undisputed, the Seventh Circuit distinguished its prior precedent and approved the trial court's determination of "the legal effect . . . (i.e., was he acting within the scope of his employment?) . . . [as a] question of law on a summary judgment motion." *Id.* at 840. That holding also appears to conflict with *Baker*, 359 U.S. at 229, and *Ward*, 362 U.S. at 400, as to the role of a jury in resolving conflicting conclusions on the basis of all relevant factors.

In any event in this case, unlike the two cited cases, there were disputed factual issues supported by evidence in the trial court and presented below. See portion of petitioner's brief in the Utah Court of Appeals, Appendix G. See also portion of his petition for writ of certiorari in the Utah Supreme Court, quoting *Baker* and referencing the record, Appendix H.

Despite this evidence as to the disputed facts, the Utah Court of Appeals held that "[t]he undisputed facts show that Ruiz was not within the scope of employment in furtherance of interstate commerce at the time of his

accident." Appendix B. That holding translates into one or more of the following:

1) there was no genuine issue as to any material fact;

2) the disputed facts proferred by petitioner were not material;

3) the facts proferred by petitioner do not provide more than a scintilla of evidence or otherwise sufficient evidence to require submission to a jury; and

4) the inferences and conclusions from the facts may be resolved as a matter of law.

In light of these possible explanations and of special interest to this petition is the post-*Baker* case of *Streeter v. Erie R.R. Co.*, 25 F.R.D. 272, 273 (S.D.N.Y. 1960) (citations omitted):

> Whether, at the time of the accident, a plaintiff was acting "while he is employed" by the railroad is generally a question of fact for the jury's determination. The circumstance by and of itself that the injury occurred before or after regularly assigned duty hours, or away from the place of regularly assigned duty, does not necessarily remove from the jury's determination the question of fact whether he was injured "while he is employed."
>
> Even where there is no dispute as to the fact of the event, the determination calls for an inference or a conclusion of fact, and this – like questions of fault or causation – must be left to a

jury unless "reasonable men could not reach differing conclusions."

CONCLUSION

The standards for resolving summary judgment motions in FELA cases require clarification. Petitioner respectfully requests that this Court grant his petition for review of the questions presented in order that the standards may be clarified and his action remanded for trial on its merits. The first question for the jury would be whether he was injured "while he [was] employed" in commerce as defined by Congress in 1939.

Respectfully submitted,

GERALD J. ADLER
Counsel for Petitioner

Dated: Aug. 26, 1996

APPENDIX

APPENDIX A

IN THE SECOND JUDICIAL DISTRICT
COURT OF WEBER COUNTY
STATE OF UTAH

JOSE RUIZ, Plaintiff, vs. SOUTHERN PACIFIC TRANSPORTATION, Defendant.	)	RULING (Filed Jan. 11, 1994) Case No. 910900648

Both parties move for partial summary judgment on the issue of whether plaintiff, a railroad employee, was within the scope of his employment when he was injured. These motions are made in the context of the Federal Employers' Liability Act.

The court grants defendant's motion for partial summary judgment. In doing so, it finds the following facts, viewed most favorably to the plaintiff:

Findings

1. The plaintiff suffered serious injuries on May 18, 1990, as a result of a one-car accident. His injuries left him mentally incompetent, and this court has appointed a guardian and conservator for him.

2. At the time of his accident, he was an employee of defendant, Southern Pacific Transportation Company. He was also a permanent resident of Ogden, Utah, but he temporarily resided at a workcamp in Montello, Nevada, to facilitate his dispatch to worksites directed by the defendant.

3. Montello had been plaintiff's ordinary "on-duty" location since January 1990. As such, defendant paid him from the time he reported to work there each day, and it also provided transportation for him and other employees to various worksites.

4. Prior to the accident, plaintiff sought permission to report to work at a worksite in Lakeside, Utah, instead of at Montello, on Friday, May 18. He made this request because he wanted to go home to Ogden the night before, and the drive back for him was closer to the worksite than to Montello.

5. His foreman, Andrew Gonzales, granted his request, subject to the agreement, discussed on several occasions prior to May 18, that because he would not be in company transportation and under company supervision, he would start and end his work at Lakeside. Accordingly, he would be on his own time and would not be compensated for his travel time to Lakeside, for which he was normally paid overtime, and, further, he would not be reimbursed for operating his private vehicle. He agreed because his proposed arrangement would also allow him to leave directly from Lakeside to Ogden and thus get home three hours sooner for the weekend. Gonzales made this agreement based on his understanding of company policy.

6. Plaintiff subsequently changed his mind about going to Ogden on Thursday night, probably because his crew worked late that day, and he stayed in Montello. His decision to drive his personal vehicle to Lakeside the next morning and to leave directly from Lakeside to Ogden did not change, however. About 5:00 a.m. the morning of the accident, Gonzales knocked on plaintiff's trailer door to inquire if he would be coming with the rest of the work crew who were in the gang truck; he declined. Instead, the plaintiff, who was dressed for work but still fixing his lunch and not assembling for work with the other crew members, said he would drive his own car and join them in Lakeside, where the crew would fix railroad tracks.

7. Enroute from Montello to Lakeside, plaintiff rolled his vehicle on a road owned by the defendant. Defendant paid plaintiff no wage compensation or travel expense for May 18, 1990.

Issues

In opposing defendant's motion, plaintiff presents two issues for determination. First, are Gonzales' declarations concerning plaintiff's statements regarding his personal travel arrangements and his status at the time of the accident objectionable hearsay under Rules 803 and 804, Utah Rules of Evidence? Second, was plaintiff's on-duty location in Lakeside or Montello on May 18, 1993?

Analysis

Based on the facts presented, the court concludes and rules as follows:

Admissions Are Not Hearsay

By his legal position, plaintiff maintains that he was within the scope of his employment at the time of his accident. His statements made to Gonzales prior to and on May 18 controvert that position. Plaintiff seeks to exclude those statements under Rules 803 and 804 on the basis that they are hearsay made inadmissible because plaintiff, who is mentally incompetent, is unavailable as a witness at trial.

Plaintiff's status is more than a witness; he is a party. Consequently, the subject statements, which are his own statements and are offered against him, are party-admissions not hearsay. See Rule 801(d)(2), Utah Rules of Evidence. These statements are, therefore, admissible. Furthermore, Rule 804, which is inapplicable in this case, is an exception to the hearsay rule to allow, not exclude, the admission of hearsay statements against interest if the declarant is "unavailable." It is a rule of necessity, having a predicate of unavailability, to avoid the loss of critical evidence.

Plaintiff Changed His On-Duty Location from Montello to Lakeside

Instead of reporting for duty at Montello with the other employees on the morning of May 18, plaintiff remained in his trailer fixing his lunch. Under his prior agreement with his foreman, Gonzales, he changed his on-duty location to Lakeside for personal reasons and having no causal relationship with his employment. By changing his on-duty location and substituting company

transportation for personal transportation, he, unequivocally, was not under the control and supervision of the defendant when he left Montello for Lakeside. In point, his employer could not supervise his conduct if he chose to exceed the speed limit or to drive without a seat belt, and thus minimize its exposure to liability. Unlike the other crew members who were in the gang truck and under the direction of their foreman and, thus, were ready to perform work as directed, plaintiff was subject to that direction only after he arrived in Lakeside. In short, he was commuting from Montello to Lakeside in his own vehicle.

The mere use of his own vehicle is not controlling in the court's determination. Plainly, the law allows an employee to drive his own vehicle with permission of the employer and still be in the course of his employment. Pivotal in the court's ruling is the agreement between plaintiff and Gonzales to change plaintiff's on-duty location to Lakeside and to be on his own time until he arrived there, thus making the ride from Montello to Lakeside a commute. The other circumstances of not being compensated and reimbursed expenses for the travel between Montello and Lakeside and of using his personal vehicle for the trip only further persuade the court that he was not in the course of his employment but pursuing personal objectives.

While it may be said that plaintiff's driving of his car to Lakeside was done in the furtherance of the mission of defendant's business, because he was needed on the job, and thus that act benefitted [*sic*] the business, it did so no more than any commute by an employee to a business so that he can perform his duties. Likewise, plaintiff's mere

presence in the workcamp in Montello, away from his permanent residence in Ogden, did not establish that he had reported to work; he needed to be available for work and under the supervision and control of the employer.

The court concludes, therefore, that there is no issue as to any material fact and that defendant was not in the course of his employment as a matter of law. Defendant's counsel shall prepare, please, an appropriate order for the court's signature.

Dated this 11 day of January 1994.

/s/ Michael D. Lyon
MICHAEL D. LYON, Judge

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IN THE SECOND JUDICIAL DISTRICT COURT
OF WEBER COUNTY STATE OF UTAH

JOSE RUIZ, Plaintiff, vs. SOUTHERN PACIFIC TRANSPORTATION COMPANY, and JOHN DOES I – X, inclusive, Defendants.	ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT Civil No. 910900648 Honorable Michael D. Lyon

Defendants' Motion for Summary Judgment and plaintiff's Motion for Partial Summary Judgment came before this Court for hearing on Thursday, December 9, 1993 at 11:15 a.m. The Honorable Michael D. Lyon presided. Plaintiff was represented by Donald Britt and Erik Ward. Defendants were represented by Bryon J. Benevento. Based upon Defendants' Motion for Summary Judgment, Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, Affidavit of Andrew Stephen Gonzales, Plaintiff's Motion for Partial Summary Judgment, Plaintiff's Memorandum

in Opposition to Defendants' Motion for Summary Judgment, Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment, Defendants' Reply to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment; and Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Plaintiff's Memorandum of Points and Authorities in Reply to Defendants' Motion to Plaintiff's Motion for Summary Judgment, Declaration of Robert Douglas, Defendants' Motion to Strike Affidavit of Robert Douglas, Memorandum of Points and Authorities in Support of Defendants' Motion to Strike Affidavit of Robert Douglas, and oral argument of counsel and for other good cause appearing thereon;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the facts presented by the parties, viewed most favorably to the plaintiff, demonstrate that as a matter of law plaintiff was not within the scope of his employment at the time he was injured. Therefore, Defendants' Motion for Summary Judgment is granted, and Plaintiff's Motion for Partial Summary Judgment is denied. The case is hereby dismissed.

DATED this 27 day of Jan, 1994.

BY THE COURT

/s/ Michael D. Lyon
Michael D. Lyon
Second Judicial District
Court Judge

APPENDIX B

IN THE UTAH COURT OF APPEALS

Jose Ruiz, Plaintiff and Appellant, v. Southern Pacific Transportation Company; and Does 1 through 10, inclusive, Defendants and Appellees.	MEMORANDUM DECISION (Not For Official Publication) Case No. 940661-CA (FILED February 1, 1996)

Second District, Weber County
The Honorable Michael D. Lyon

Attorneys: Erik M. Ward, Ogden, Donald S. Britt and Gerald J. Adler, Sacramento, California, for Appellant E. Scott Savage, Casey K. McGarvey, and Byron J. Benevento, Salt Lake City, for Appellees

---

Before Judges Orme, Bench, and Jackson.

BENCH, Judge:

Ruiz Asserts that the trial court erred by granting summary judgment to Southern Pacific. Ruiz claims that there is a genuine issue of material fact concerning whether he was pursuing a duty in "furtherance of interstate . . . commerce" when his vehicle rolled over on a

Southern Pacific road. *See* 45 U.S.C.A. § 51 (1986). We affirm.

Ruiz was not in furtherance of interstate commerce when his accident occurred. Ruiz does not dispute that he had made previous arrangements with his supervisor to drive his own vehicle to the work site for "personal reasons." Because Ruiz was pursuing his own interests by driving his own vehicle to Lakeside, and not the interests of Southern Pacific, he was not pursuing a duty "in furtherance of interstate commerce." *See Atchison, Topeka & Santa Fe Ry. Co. v. Wottle*, 193 F.2d 628, 631 (10th Cir.), *cert. granted, Wottle v. Atchison, Tobeka [sic] and Santa Fe Ry. Co.*, 343 U.S. 963, 72 S. Ct. 1063, *cert. dismissed, Wottle v. Atchison, Tobeka [sic] and Santa Fe Ry. Co.*, 344 U.S. 850, 73 S. Ct. 89 (1952). The fact that he was driving on a Southern Pacific road does not compel a different result.

Ruiz argues that, according to the Collective Bargaining Agreement, he should have been paid during his travel. Rule 30 of the Collective Bargaining Agreement provides, however, that "[e]mployes shall not be allowed time while traveling . . . between their homes and designated assembling points, or for other personal reasons." Thus, because Ruiz was traveling in his own vehicle for personal reasons, he was not entitled to pay.

Ruiz also asserts that his assembling point was at Montello rather than Lakeside. Based on Ruiz's [*sic*] agreement with his supervisor, Ruiz agreed to assemble at Lakeside despite the fact that the rest of his work gang assembled at Montello.

The undisputed facts show that Ruiz was not within the scope of employment in furtherance of interstate commerce at the time of his accident. *See Rogers v. Chicago & North Western Transp. Co.*, 947 F.2d 837, 839 & n.4 (7th Cir. 1991). We therefore affirm the summary judgment entered in favor of Southern Pacific.

/s/ Russell W. Bench
Russell W. Bench, Judge

WE CONCUR:

/s/ Gregory K. Orme
Gregory K. Orme,
presiding Judge

/s/ Norman H. Jackson
Norman H. Jackson, Judge

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF UTAH

Jose Ruiz,

Plaintiff and Petitioner,

v.

Southern Pacific Transportation Company,

Defendant and Respondent.

No. 960115
940661-CA
910900648

The Petition for Writ of Certiorari is denied.

5/29/96
Date

/s/ M. Zimmerman
Michael D. Zimmerman
Chief Justice

For The Court

APPENDIX D

§ 51. Liability of Common Carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employees shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases"

(approved April 22, 1908) [45 USCS §§ 51 et seq.] as the same has been or may hereafter be amended.

(Apr. 22, 1908, ch 149, § 1, 35 Stat. 65; Aug. 11, 1939, ch 685, § 1, 53 Stat. 1404 [adding second paragraph].)

APPENDIX E

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IN THE SECOND JUDICIAL DISTRICT COURT
OF WEBER COUNTY

FOR THE STATE OF UTAH

JOSE RUIZ, Plaintiff, v. SOUTHERN PACIFIC TRANSPORTATION COMPANY, and JOHN DOES I-X, inclusive, Defendants.	**MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** Civil No. 910900648 Honorable Michael D. Lyon Hearing Date: 12/9/93

* * *

Since the facts indicate plaintiff had already reported to work before his automobile accident, he was within the scope of employment at the time of his injury. *Atchison, T. & S.F. R. Co. v. Wottle* (10th Cir. 1952) 193 F.2d 628, 630. (See copies of pertinent case law, Exhibit "B".) In *Atchison*, the court held once a railroad employee reports

for duty, any subsequent injury he suffers is within the scope of employment. The court said:

> It is no longer doubted that the [FELA] extends to and covers not only the actual work performed . . . but those acts which can be said to be necessarily incident thereto. Thus an employee is working [within the scope of employment] ***while going to and from his actual place of work after reporting for duty.*** *Id.* [Citations omitted, emphasis added.]

Thus, even if the courts [*sic*] admits the hearsay portions of the Gonzales declaration, plaintiff has provided sufficient facts showing plaintiff was within the scope of employment at the time of his injury.

3. Fact ten is also disputed because defendant admits they permitted plaintiff to use his own car to drive to the Utah worksite. In his deposition, Mr. Gonzales said he gave plaintiff permission to use his own car.

> Q. . . . When you saw him, you saw him at his trailer at Montello Friday morning about five a.m. correct?
>
> A. Yes.
>
> Q. Leyba was in the truck along with Corral?
>
> A. Yes.
>
> Q. You got out of the truck and knocked on his trailer door, correct?
>
> A. Yes.
>
> Q. And asked if he wanted to go in the truck with you, correct?
>
> A. Yes.

Q. And he said no, I'll drive my car so I can leave from Lakeside, correct?

A. Yes.

Q. And you said "Fine" I'll meet you there, correct?

A. Yes. (Exhibit "A" at 69:20 to 70:13)

This admission compels a finding plaintiff was within the scope of employment at the time of his injury. Whether plaintiff was compensated for that trip is not relevant.[1]

In *Temple v. Southern Pacific Trans. Co.* (Cal. 1980) 105 Cal.App.3d 988 (See Exhibit "B"), a brakeman was injured in an automobile collision while returning to his train after a layover. *The brakeman had been driving his own car at the time of the injury.* The brakeman brought a FELA action. The railroad moved for summary judgment asserting the injury did not occur while plaintiff was in the scope of employment. The court reversed summary judgment for the railroad, stating:

> [I]f the activity in which the [employee] was engaged at the time of the tort complained of was within the course and scope of employment, *the fact that the automobile was used by him and which caused the injury, belonged to the [employee], will not preclude the person injured in recovering from the employer, if the [employee's] use of the vehicle was, either expressly or impliedly, authorized by the employer. Id.* at 993.

---

[1] The collective bargaining agreement between plaintiff's union and defendant should have compelled defendant to pay the cost of plaintiff's drive to the worksite.

Thus, the express grant of permission to plaintiff to use his own car to drive to the Utah worksite precludes summary judgement and actually militates in favor of finding plaintiff was within the scope of employment when he was injured.

ARGUMENT

II.

DEFENDANT IS LIABLE FOR INJURIES THAT OCCUR INCIDENT TO THE ACTUAL WORK

This is an action for personal injuries by a railroad worker pursuant to the Federal Employer's Liability Act (FELA) 45 USC §51 et seq. On or about May 14, 1990, plaintiff JOSE RUIZ was injured in a solo rollover type automobile accident while driving his car on a private road owned and maintained by defendant SOUTHERN PACIFIC. This road paralleled the railroad tracks.

At the time of injury plaintiff was an employee of SOUTHERN PACIFIC and was driving on the railroad's private road towards his Utah worksite *after* reporting to work at his employer's Nevada workcamp. Defendant moves for summary judgment asserting plaintiff was not in the scope of employment at the time of the injury because he was driving his own car (rather than riding in the company truck) towards the worksite and was therefore "commuting to his workplace" and not in the scope of employment at the time of injury.

This contention is wrong. The FELA establishes SOUTHERN PACIFIC is liable in tort for any worker injury suffered in the scope of employment. Scope of

employment has been interpreted to encompass acts "incidental to the employment as well as the actual work." *Fowler v. Seaboard Coastline R. Co.* (5th Cir. 1981) 638 F.2d 17, 20. Thus, an employee is considered within the scope of his employment though he was not engaged in his actual work at the time of the injury. See, *Erie Railroad Co. v. Winfield* (1917) 37 S.Ct. 556 [employee injured while leaving rail yard after work held within scope of employment]; *Morris v. Penn. RR Co.* (1st Cir. 1951) 187 F.2d 837 [employee killed at place of employment shortly before he was to report to work held within scope of employment]; *Texas & Pacific RR v. Jones* (5th Cir. 1962) 298 F.2d 188 [injured worker not performing usual task, but helping fellow worker, held within scope of employment.]

In *Leek v. B & OR. Co.* (MD W.Va 1962) 200 F.Supp. 368, 371 the employee was injured while riding in a taxi cab from the worksite to the railroad yard. The court found the taxi cab company acted on behalf of the railroad which brought the injury within the scope of the FELA.

Defendant claims plaintiff was commuting to work at the time of his injury. To support this claim, defendant offers the declaration of Mr. Gonzales who asserts plaintiff asked for and received permission to drive his own car from the Nevada workcamp where the maintenance crew had assembled to the worksite location in Utah. Apparently, defendant believes plaintiff's receipt of permission to drive his own car to the worksite somehow changed his status on the day of injury from one who had already reported to work and was on his way to the worksite to one who was merely commuting to work.

However, defendant admits plaintiff's home was in Ogden, Utah, hundreds of miles from the Nevada workcamp, and that plaintiff could drive home for the weekend after work rather than go back to the workcamp in Nevada to return his car. Defendant also admits plaintiff appeared at the workcamp, ready for duty. Only after plaintiff apparently talked to Mr. Gonzales did he leave for the worksite in Utah. These facts clearly indicate plaintiff had "reported for duty" before his accident. Therefore, the court can reach but one conclusion; plaintiff JOSE RUIZ was in the scope of employment at the time of his injury on May 14, 1990. *Atchison, T. & SF RR. Co. v. Wottle* supra, 193 F.2d 628, 630.

APPENDIX F

IN THE UTAH COURT OF APPEALS

JOSE RUIZ, Plaintiff/Appellant v. SOUTHERN PACIFIC TRANSPORTATION COMPANY, Defendant/Appellee	Appellate Court No. 940661-CA Priority Classification 15

BRIEF OF APPELLANT

AN APPEAL FROM THE SECOND DISTRICT COURT
WEBER COUNTY

Judge Michael D. Lyon

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* * *

VI. SUMMARY OF ARGUMENTS

1. *Applicability and scope of federal law to plaintiff's employment status.*

A. The rights and obligations of the parties in a Federal Employers' Liability Act case are controlled by federal law.

B. The term "employed" as used in the Federal Employers' Liability Act of 1908 was intended to describe the conventional relationship of employer and employee.

C. By amendment in 1939 Congress expanded the benefits of the Federal Employers' Liability Act so as to avoid narrow distinctions and to comprehensively expand coverage.

2. *Plaintiff's employment status prior to the accident*

A. Plaintiff Jose Ruiz was covered by the Federal Employers' Liability Act before leaving his trailer headquarter [*sic*] on the day of the accident.

B. Because plaintiff's trip from his headquarters to the work site was a necessary incident of his employment, he was covered by the act during the entirety of his trip prior to the accident.

C. Because plaintiff was on defendant's private road leading to the actual work site, he was covered by the act during at least that portion of his trip.

3. *The trial court's errors.*

A. Plaintiff's mode of travel did not remove him from the act's coverage.

B. Neither the willingness of plaintiff to forego pay nor the understanding of his supervisor in that regard removed plaintiff from the act's coverage and benefits.

C. The trial court erred in not ruling as a matter of law, against defendant's motion for summary judgment.

D. At the very least, the trial court erred in not ruling that there were material triable issues of fact.

* * *

APPENDIX G

IN THE UTAH COURT OF APPEALS

JOSE RUIZ, Plaintiff/Appellant v. SOUTHERN PACIFIC TRANSPORTATION COMPANY, Defendant/Appellee	Appellate Court No. 940661-CA Priority Classification 15

BRIEF OF APPELLANT

AN APPEAL FROM THE SECOND DISTRICT COURT
WEBER COUNTY

Judge Michael D. Lyon

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* * *

C. The court failed to recognize triable factual issues.

Although it is the view of plaintiff that, as a matter of law he was "employed" at the time of his injury, it must be pointed out that even under the trial court's view of material facts, there were material factual issues in dispute. Those issues concern plaintiff's "on-duty" point, the validity of any agreement to change that point and plaintiff's entitlement to pay.

In its findings and ruling, the court determined that plaintiff's request to drive his own vehicle to the work site constituted a request to report to work at Lakeside, Utah and, therefore, change his "on-duty" location from its usual location at Montello, Nevada. That purported change in "on-duty" location, by the court's analysis, converted the trip to the work site into a "commute" during which plaintiff was "not in the course of his employment."

In making these finding [*sic*] and ruling, the court ignored the following evidence:

(1) Under the collective bargaining agreement, employees' time starts at regular designated assembly points. (R. at 352, 418).

(2) When an employee's living quarter is a trailer furnished by the railroad, the trailer is established as the employee's headquarters and designated assembly point. (R. at 353, 418).

(3) Plaintiff's foreman did not have authority to alter plaintiff's starting time. (R. at 418).

(4) Plaintiff "assembled" at his headquarter [*sic*] point at Montello, Nevada. (R. at 418-19).

The court also found persuasive the fact that plaintiff was not compensated by defendant for his travel time after leaving the work camp enroute to the work site. However, the preceding evidence, also established that plaintiff was entitled to be compensated for that time. In addition, there was other competent evidence, relating to the pay issue, which was presented by the general chairman of plaintiff's union, that under the collective bargaining agreement, plaintiff was entitled to be compensated starting at Montello on the day of his accident. (R. at 417-19).

Thus, even if the FELA were ignored, as the trial court did, and everything turned on plaintiff's "agreement" and on the issue of pay, the trial court ignored evidence relating to the validity and effect of the "agreement" as it related to both the designated assembly point and plaintiff's entitlement to pay for his time going to the work site.

On this analysis alone the court erred in concluding as a matter of law that plaintiff was not in the scope of his employment.

* * *

APPENDIX H

IN THE UTAH SUPREME COURT

JOSE RUIZ, Plaintiff/Petitioner vs. SOUTHERN PACIFIC TRANSPORTATION COMPANY, Defendant/Respondent	**PETITION FOR WRIT OF CERTIORARI** Case Number; 940661-CA Priority Classification 15

PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE COURT OF APPEALS

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THE SECOND DISTRICT COURT
WEBER COUNTY

Judge Michael D. Lyon

* * *

The federal FELA rule is similar:

> The Federal Employers' Liability Act does not use the terms "employee" and "employed" in an special sense. . . . It has been well said of the question that "[e]ach case must be decided on its peculiar facts and ordinarily no one feature of the relationship is determinative." . . . [T]he question, like that of fault or of causation under the Act, contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law. . . . Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury. *Baker v. Texas & Pac. Ry. Co., supra* at 228.

Although it is the view of plaintiff that, as a matter of law he was "employed" at the time of his injury, it must be pointed out that even under the trial court's view of material facts, there were material factual issues in dispute. Those issues concern plaintiff's "on-duty" point, the validity of any agreement to change that point and plaintiff's entitlement to pay.

In its findings and ruling, the court determined that plaintiff's request to drive his own vehicle to the work site constituted a request to report to work at Lakeside, Utah and, therefore, to change his "on-duty" location

from its usual location at Montello, Nevada. See Appendix B. That purported change in "on-duty" location, by the court's analysis, converted the trip to the work site into a "commute" during which plaintiff was "not in the course of his employment."

In making these findings and ruling, the court ignored the following evidence:

(1) Under the collective bargaining agreement, employees' time starts at regular designated assembly points. (R. at 352, 418).

(2) When an employee's living quarter is a trailer furnished by the railroad, the trailer is established as the employee's headquarters and designated assembly point. (R. at 353, 418).

(3) Plaintiff's foreman did not have authority to alter plaintiff's starting time. (R. at 418).

(4) Plaintiff "assembled" at his headquarters point at Montello, Nevada. (R. at 418-19).

The court also found persuasive the fact that plaintiff was not compensated by defendant for his travel time after leaving the work camp enroute to the work site. However, the preceding evidence also established that plaintiff was entitled to be compensated for that time. In addition, there was other competent evidence relating to the pay issue which was presented by the general chairman of plaintiff's union, that under the collective bargaining agreement, plaintiff was entitled to be compensated starting at Montello on the date of his accident. (R. at 417-19)

Thus, even if the FELA were ignored, as the trial court did, and everything turned on plaintiff's "agreement" and on the issue of pay, the trial court ignored evidence relating to the validity and effect of the "agreement" as it related to both the designated assembly point and plaintiff's entitlement to pay for his time going to the work site.

On this analysis alone, the court erred in concluding as a matter of law that plaintiff was not in the scope of his employment.

This error, in contravention of the teachings of this court and the United States Supreme Court, is a further basis in support of this petition for review.

* * *